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The Constitutional Logic of Campaign Finance Regulation

Samuel Issacharoff*

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For more than a generation now, American campaign finance law has been buffeted between the rivalrous concerns of the law governing the political process. On the one hand are the myriad everyday rules that control the act of voting: the details from the siting and hours of operation of polling places, to the voter registration lists, and the recruitment and training of poll workers. Except in dramatically undecided elections, such as the 2000 presidential election in Florida, or when the rules are deliberately manipulated to keep vulnerable groups from being able to participate, this is an area relegated to administrative oversight and its judicial accompaniment, rational relations review. This area of “election law” has all the allure of city council debates on garbage pick-up routes, with few of the immediately observable benefits.

On the other side of the ledger is the domain of political speech, the core concern of the First Amendment. Indeed, nowhere is speech more central to the democratic enterprise as when directed to the issue of who shall govern. The invocation of speech on central matters of public concern implicates a distinct set of constitutional issues, with the accompanying doctrinal attachment to the strict scrutiny standard of review. As soon as speech is implicated, warning bells go off should the state attempt to regulate on the basis of content or viewpoint, or should the regulation not satisfy the most exacting standard of a compelling governmental interest.

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The financing of political campaigns is at once a preliminary act that is neither the vote nor electoral speech itself, yet it is ultimately directed to the propagation of a political message to the electorate. As such, it can be conceptualized as an administrative matter or as the very heart of the freedom of expression that undergirds democracy. Each of these approaches finds support from contending wings of a deeply fractured Supreme Court. One wing of the Court, most prominently led by Justice Stevens, rejects the conception that money is speech,¹ while another, most forcefully led by Justice Thomas, views virtually all restrictions as an affront to the heart of First Amendment values.²

At the doctrinal level, the Court has temporized by truncating efforts at reform. In the intricate constitutional balance following *Buckley v. Valeo*,³ the Court has placed campaign contributions on the administrative side of the ledger. The need to combat corruption, or even the appearance of corruption, has allowed a wide margin of regulatory discretion, almost at the benign level of time, place, and manner restrictions under classic First Amendment doctrine. At the same time, campaign expenditures have been drawn into the core of the protections of political expression, with the result that efforts to curb candidates' and parties' spending habits have been struck down time and again. The contributions/expenditures divide is the deeply contested legacy of *Buckley*, a battered divide that has been rejected by a majority of the Court for at least a decade. Indeed, in the Court's most recent encounter with campaign finance, the Justices at the historic center of the Court—Justices Breyer and Kennedy, who together have stitched much of the ever-finer refinements of the *Buckley* legacy⁴—have moved to the polar positions and seem prepared to jettison the Court's historic approach to this deeply contested issue.⁵

After three decades of *Buckley*, it is difficult to imagine a world in which there are either no restrictions on contributions or significant limitations on expenditures. This may be a failure of imagination because the Court seems poised once again to make a decisive move against *Buckley*.⁶ If *Buckley* were to fall, it will be necessary to craft a new

1. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property; it is not speech.").

2. See, e.g., *id.* at 412 (Thomas, J., dissenting) ("[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny.").

3. 424 U.S. 1 (1976).

4. See, e.g., *Colo. Republican Fed. Election Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Shrink*, 528 U.S. 377.

5. *Davis v. FEC*, 128 S. Ct. 2759 (2008).

6. See *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

approach to the funding of political campaigns—one that may push the frontiers of what has been attempted in the U.S. previously.

Here I want to turn to an aspect of the most recent reform effort, the Bipartisan Campaign Reform Act of 2002 (BCRA)⁷ that I have previously identified as portending a significant change in the common conception of campaign regulation.⁸ The provision is the definition of the “election period” as a period of greater regulatory authority over “electioneering communications” that are likely aimed at affecting voter choices in elections.⁹ To date, this framing of a distinct First Amendment arena during the immediate run-up to an election has not formed part of the Court’s sweeping facial review of BCRA.¹⁰ Yet the idea that the period of elections might serve as a distinct arena of regulation has a significant background in academic commentary in this country,¹¹ as well as in the practices in other democracies of treating the election period as a limited forum for communication by the candidates for office rather than as a general forum for political advocacy.

As set out in BCRA, the election period triggers a restraint on communications outside the formal strictures of the Federal Election Campaign Act (FECA)—what are termed independent expenditures fueled by soft money in the campaign finance lexicon.¹² BCRA amended FECA to regulate “electioneering communication,”¹³ a term that replaced the prior rule of *Buckley v. Valeo* that had limited regulation only to express advocacy on behalf of a candidate—understood to be triggered by the magic words of “vote for,” “support,” “elect,” “defeat,” and so forth.¹⁴ In place of *Buckley*’s definition, BCRA claims to regulate any communication that in any way refers to a candidate for federal office in the period sixty days before a general election or thirty days before a primary election if it is “targeted to

7. Pub. L. No. 107-155, 116 Stat. 81 (2002).

8. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1458 (2007).

9. See BCRA § 201(a) (codified as 2 U.S.C. § 434(f)(3) (2006)).

10. See *McConnell v. FEC*, 540 U.S. 93 (2003).

11. See, e.g., Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1839 (1999) (proposing “a detailed appraisal of what constitutionally would be gained, and what lost, by demarcating elections as a separate domain of First Amendment doctrine”); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

12. See BCRA § 201(a) (codified as 2 U.S.C. § 434).

13. *Id.*

14. See 424 U.S. 1, 43–44 (1976).

the relevant electorate,” which means it “can be received by 50,000 or more persons” in the district or state the candidate seeks to represent.¹⁵

The purpose of this particular reform was to close the loophole for issue advocacy: ads that could raise all sorts of scurrilous claims about a candidate for office but end with an anodyne suggestion that the candidate be “called” or “asked about” the assertions in the ad.¹⁶ As Richard Briffault writes of the pre-BCRA world, “Pragmatically, the current test is an open invitation for evasion. It is child’s play for political advertisers and campaign professionals to develop ads that effectively advocate or oppose the cause of a candidate but stop short of the formal express advocacy that the courts permit to be regulated.”¹⁷

*McConnell v. FEC*¹⁸ did not really engage the question whether a distinct constitutional regime could be created for a narrow period defined by temporal proximity to the election. Instead, the challenge to this section of BCRA was premised only on a curious claim that, because express advocacy was subject to regulation under FECA, there must be some form of constitutional entitlement to issue advocacy. The Court readily dismissed this argument: “That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.”¹⁹

Perhaps one reason that the election period provision of BCRA did not arouse more constitutional scrutiny was the odd combination of a significant conceptual breakthrough in how to think about campaign finance regulation with a rather trite set of accompanying regulations. Once inside the domain of the election period under BCRA, the only resulting requirements are disclosure of campaign funding sources and a prohibition on the use of contributions from corporations or unions.²⁰ Disclosure is the least intrusive form of finance regulation and has been tolerated in almost all settings. Similarly, corporations and unions are thought to be suspect cauldrons of other people’s money and, accordingly, are subject to much greater regulation than individual citizens. As the Court noted in addressing whether corporations devoted to advocacy could be restricted from contributing to political campaigns, “Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in

15. BCRA § 201(a) (codified as 2 U.S.C. § 434(f)(3)(C)).

16. For a discussion on the role of issue advocacy prior to BCRA, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 519–21 (3d ed. 2007).

17. Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1759 (1999).

18. 540 U.S. 93 (2003).

19. *Id.* at 190.

20. See BCRA § 203 (codified as 2 U.S.C. § 441b).

refinement of the law, sometimes in overhaul Today, as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process."²¹

Despite the unprecedented nature of a distinct election period, however, BCRA's actual regulations bore little practical import. Nonetheless, an examination of other constitutional democracies, most notably Great Britain, reveals that the concept of a formal election period is a much richer source of potential regulation of campaign activity than contemplated by the limited engagement in BCRA. The reason, however, is that the election period as it has emerged historically in Britain is part of an organic conception of elections that is significantly at variance with the core precepts of our First Amendment tradition and our conception of politics. In this essay, I want to do two things. First, I want to present in some detail the comprehensive regulations of the election period that exists or existed in Britain and the potentially landmark ruling by the European Court of Human Rights (ECHR) in *Bowman v. United Kingdom*.²² Second, I want to further compare core cases from Germany and Canada to flesh out the point that reforms, to be meaningful, must have a core logic—one that will prove problematic under the inherited First Amendment traditions in the U.S.

I. THERE WILL ALWAYS BE AN ENGLAND

The first thing to note about BCRA's "election period" is that it has an artificially precise time period—thirty days before a primary and sixty days before a general election for federal office.²³ The reason for the artificial constraints is that there is no natural period for electoral activity in the U.S. Federal elections take place on a designated date every two, four, or six years, depending on the office. It is entirely possible for the presidential election cycle to consume virtually the full four years between elections. Correspondingly, it is increasingly the case that political strategists such as Harold Ickes and, most conspicuously, Karl Rove have come to leverage election strategy expertise into central policy positions in the White House.

But the open-ended American campaigns are by no means the rule in democratic nations. In parliamentary systems, the timing of elections is a matter of circumstance rather than a preordained constitutional requirement. When a government faces a no-confidence vote, loses its parliamentary

21. *FEC v. Beaumont*, 539 U.S. 146, 153 (2003).

22. 1998-I Eur. Ct. H.R. 175.

23. See BCRA § 201(a) (codified as 2 U.S.C. § 434(f)(3)).

majority, believes that the moment is particularly propitious, or has major leaders forced from office by scandal or prosecution, elections are called for a date specified at the time. The election period thus has a natural rhythm to it, beginning with the calling of elections and ending with the elections themselves. The resulting period can be quite short. For example, in 2005, the Blair government in Britain called for new elections on April 5th, with the elections themselves being held on May 5th, a scant thirty days later.²⁴

The ensuing election period is a tightly regulated affair, something beyond any serious reform proposals in the U.S.²⁵ The election period is deemed not an arena of open political discourse but a confined decision by the voters among the choices presented by the established political parties. Certainly, there is a corresponding impulse in American law governing the political process to treat the general election as the “main event” and, accordingly, liberally to uphold restrictive ballot access provisions for minor party candidates.²⁶ But the British variant defies anything deemed compatible with American First Amendment jurisprudence.²⁷ To begin with, there is no tradition in Britain of permitting paid television advertising for elections, whether by candidates, parties, independent organizations, or anyone else.²⁸ The distinction between express and issue advocacy is of no moment; candidates for office are given specific invitations to state-provided media access and no more.²⁹ Although candidates for Parliament do not receive public funds, they are restricted in how much they can spend.³⁰ In 1998, at the time of the *Bowman* litigation, the amounts varied somewhat by constituency but averaged about £8,300,³¹ about \$14,000 at the time—an

24. See, e.g., Alan Cowell, *Blair Calls Election for May 5 as His Party Slips in Polls*, N.Y. TIMES, Apr. 6, 2005, at A3.

25. For a thorough discussion of the relation between the European conception of an election period and American constitutional law, see Saul Zipkin, *Political Ads, The Vote, and the Democratic Process* (Sept. 2008) (unpublished manuscript, on file with author).

26. I have been quite critical of the Court's failure to account for the risk of lock-ups of the political process and political debates by allowing too much discretion to state officials in closing off ballot access. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). For overviews of the case law upholding restrictive access to the general election ballot, see Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1287–1302 (2005); James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413 (2007); David Schleicher, “*Politics as Markets*” Reconsidered: *Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163 (2006).

27. See Jacob Rowbottom, *Access to the Airwaves and Equality: The Case Against Political Advertising on the Broadcast Media*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 77, 77–96 (K.D. Ewing & Samuel Issacharoff, eds., 2006).

28. *Id.* at 77.

29. *Id.* at 77–78.

30. See *Bowman v. United Kingdom*, 1998-I Eur. Ct. H.R. 175, 183–84.

31. *Id.*

amount orders of magnitude different from the U.S., where winning candidates for Congress in 2006 spent an average of \$1.3 million.³² The tight limitations on individual candidates' spending contrasts with the broader spending ability of the national parties, which means that electoral debate was financially permitted at the level of party platforms but not at the level of individual candidates.³³

Parliamentary candidates with such limited war chests would be highly vulnerable to interest group attack and would lack the resources to fight back. Accordingly, there has to be some measure of protecting the electoral combatants from outside challenges if such low spending limits are to be enforced—and there is. To begin, any express advocacy is barred to anyone other than the candidate.³⁴ In addition, as of 1998, during the election period, no British citizen could spend more than £5 (that's right, £5, or less than \$10!) to express any views on the British elections.³⁵ As a result, for all practical purposes, political debate during the election period was restricted to the political parties whose candidates were running for office and only to those issues that they wished to address. Even under today's technology-assisted means of communication, £5 is not enough money to register a domain name, let alone pay for the bandwidth required to run an advocacy website.

II. THE SPECTER OF *BUCKLEY V. VALEO*

No case describes the meaning of the British election period better than *Bowman*. At the time of her prosecution for violation of Britain's election laws, Phyllis Bowman was the executive director of the Society for the Protection of the Unborn Child (SPUC), an anti-abortion organization, as the name implies.³⁶ The organization sought to agitate against Britain's liberal abortion laws by raising the political profile of the issue.³⁷ As hard as it is for American observers to believe, abortion plays no role whatsoever in British parliamentary elections. As summarized by the ECHR,

32. Common Cause, Clean Elections for the United States Congress: Taking Big Money Out of Politics with the Fair Elections Now Act, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4104607> (last visited Jan. 15, 2009).

33. See Navraj Singh Ghaleigh, *Expenditure, Donations and Public Funding Under the United Kingdom's Political Parties, Elections Referendum Act of 2000—And Beyond?*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE, *supra* note 27, at 35, 37.

34. *Bowman*, 1998-1 Eur. Ct. H.R. at 185-86.

35. *Id.*

36. *Id.* at 180.

37. *Id.*

The major political parties have no policies with regard to abortion and embryo experimentation: these are regarded as moral issues and members of Parliament are allowed to vote on proposed legislation according to their consciences. Mrs. Bowman and SPUC therefore took the view that, if electors were to be in a position to bring about changes to the law through their choice of representative, it was important for them to be informed of the opinions of candidates standing for election with regard to abortion and related issues.³⁸

In an attempt to compel political accountability on the issue of abortion, SPUC made arrangements to distribute over a million leaflets across the UK alerting voters as to the positions of the various candidates: "We are not telling you how to vote, but it is essential for you to check on Candidates' voting intentions on abortion and on the use of the human embryo as a guinea-pig."³⁹ The leaflet then went on to chronicle the positions taken historically by the various candidates for office, together with a graphic depiction of the stages of development of an embryo during the twenty-two weeks that marked the British period before limitations on abortions took hold.⁴⁰ Because the cost of distribution of the leaflets exceeded the statutory maximum of £5, Bowman found herself subject to prosecution—incidentally, not for the first time.⁴¹

Despite some procedural uncertainty that precluded successful prosecution of Bowman on this particular occasion, the ECHR ultimately struck down the British electioneering restrictions for their potentially chilling effect on political speech.⁴² The ECHR was not impressed by Bowman's alternatives of running for office herself or starting a newspaper, which would be immune from any limitation on speech.⁴³ Instead, the ECHR found a sweeping right to free political expression under Article 10 of the European Convention on Human Rights and under the guarantee of free elections under Article 3 of the First Protocol to the Convention:

38. *Id.*

39. *Id.* at 181.

40. *Id.* at 181–82.

41. *Id.* at 182.

42. *Id.* at 189–90.

43. *Id.* at 189. The paradox of the media being unrestricted in disseminating their election views is also the subject of debate in the U.S. See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1630 (1999) (arguing that a media exception to campaign finance laws is "unjustifiable"); Danny J. Boggs, *Introduction: Campaign Finance and Media Influence*, 24 HARV. J.L. & PUB. POL'Y 5, 6 (2000) (arguing that the importance of the media in campaigns is underappreciated). For a strong rejoinder, see L.A. Powe, Jr., *Boiling Blood*, 77 TEX. L. REV. 1667 (1999).

Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature.” For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.⁴⁴

The ECHR’s expansive view of a liberty interest in free expression sent shock waves into the British system of election regulation. Once private parties are freed from expenditure restrictions, individual candidates could be targeted for challenge based upon individual performance or individual views. They could no longer assume the protective mantle of the national party as the focus of politics, even at the level of the individual constituency. The response of threatened politicians, or their partisans, would necessarily be to attempt to answer charges against them through their own expenditures, which seemingly would also be uncapped by the logic of the ECHR’s ruling in *Bowman*. Once freed from expenditure restraints, the sole form of regulation left would be limitations on contributions—a particularly disruptive move in Britain, where the parties are directly funded by their major backers, as is the Labour Party by the trade unions.⁴⁵ In short, *Buckley* all over again. Or as Baroness Hale of the House of Lords would comment in one of the British post-*Bowman* cases, *Buckley* and its progeny in American campaign finance law became the “elephant in the committee room” for subsequent debates in Britain.⁴⁶

But this was not the only blow to the election period limitations in Britain. *Bowman* was followed by another ECHR case from Switzerland,

44. *Bowman*, 1998-I Eur. Ct. H.R. at 188 (citations omitted).

45. The Labour Party historically has received more than 60% of its funding from the Trade Union Congress. See K.D. EWING, *THE COST OF DEMOCRACY: PARTY FUNDING IN MODERN BRITISH POLITICS* 5 (2007); Ghaleigh, *supra* note 33, at 52 (describing party shortfalls should there be contribution limits). The first measures of contribution regulation in Britain came with the disclosure requirements of the Political Parties, Elections and Referendums Act 2000. For a discussion of party funding and the effect of the potential restrictions, see K.D. Ewing, *The Disclosure of Political Donations in Britain*, in *PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE*, *supra* note 27, at 57.

46. *Regina (Animal Defenders Int'l) v. Sec'y of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 A.C. 1312, 1353 (appeal taken from Eng.) (U.K.).

VgT Verein gegen Tierfabriken v. Switzerland,⁴⁷ which raised the possibility that any ban on political advertising on the broadcast media may also violate Article 10 of the European Charter on Human Rights.⁴⁸ The combination of open expression during the election period and potential access to political advertising currently places the core organizing principles of the British election period at peril.

The point is, of course, not to exalt the centrality of the debates over abortion in political life in this country or to hope that this particular issue takes on more force elsewhere. The prominence of the abortion issue in American politics is, at the very least, certainly no unalloyed good. From my personal vantage point, the ability of the polar positions on the abortion debate to dominate politics and judicial appointments is an unfortunate feature of contemporary American life, one that the Supreme Court may have unwittingly sparked by its rush to overly regimentalize constitutionalization of the abortion debate—a position that I am far from the first to articulate.⁴⁹ It is a far reach, however, to go from a desire to dampen the role of abortion politics all the way to a governance rule for elections that would allow the incumbent political parties effectively to silence debate on the issue altogether, particularly in light of its manifest salience in American political life.

To force such issues to the sideline is more than simply disregarding the desire of members of the polity to engage issues that may be politically treacherous for entrenched political parties. Shutting down debate during the election period forecloses the ability of activists and non-elected political actors to engage their fellow citizens when political attention is galvanized around elections. As Saul Zipkin well explains:

The pre-election period is a time of heightened engagement with the democratic process: a time when both voters and political actors are more attentive to one another. Political scientists have found that voters pay closer attention as the election draws near and posit a “recency bias” (or the “what have you done for me lately” phenomenon), where voters weigh more heavily their representatives’ recent actions, in response to which politicians

47. 2001-VI Eur. Ct. H.R. 243.

48. For a discussion on the potentially sweeping impact of *VgT*, see Rowbottom, *supra* note 27, at 80–81.

49. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (arguing that the “sweep and detail” of the Court’s rigid definition of constitutional rules in *Roe v. Wade* and companion cases “stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures”).

seeking re-election attempt to accomplish more for their constituents toward the end of their terms.⁵⁰

A core divide may be found in the underlying theoretical view of the election process. On the one hand, the elections constitute the highest point of citizen involvement. For those, like myself, who worry about the preservation of the competitive environment, the role of competition is not simply to force retrospective accountability of officeholders, a mechanism that reduces the agency drift between the preferences of voters and the policy choices of elected officials. The purpose of electoral competition is also to force candidates for office to educate the public, help shape preferences, and provide information so that there is an improvement in the quality of citizen engagement with self-governance. The repeated analogy is to the way firms in which sellers in competitive markets help inform the consumer in the course of trying to demonstrate the superiority of their product.

On the other hand, it is perfectly possible to see elections themselves as merely an act of tabulation, as James Gardner terms it.⁵¹ If so, then elections are purely an administrative event, governed by conventional rules of proper administrative processes and carrying no more constitutional baggage than the handling of garbage collection or recycling. The purpose of competition then becomes a periodic check on the alignment between voter preferences and the continued office-holding of prior electoral victors. Under this view, competition is more static and serves to force preference choices back to those of the median voter—a narrower view of the scope and benefits of competition, as David Schleicher argues.⁵²

Perhaps, as with all polar categories, the truth may lie somewhere closer to the midpoint between the rival conceptions of elections. My purpose here is not to try to resolve this tension but to identify it. The American First Amendment tradition has treated electoral speech as the vehicle for expression and citizen engagement. The post-*Buckley* debates on contributions versus expenditures turn on which (if any) should be categorized as speech. If so characterized, then the First Amendment applies with full force.

The British tradition is another matter. With its abrupt declaration of the election period, the prohibitions on speech by non-candidates, and the very

50. Zipkin, *supra* note 25, at 46.

51. See Gardner, *supra* note 26.

52. See Schleicher, *supra* note 26.

limitation of time in which the public is even considering elections, the British electoral process harkens much to the tabulative side of elections as an administrative tallying of preferences as they exist. For the nascent election period approach of BCRA to have real traction, both in practice and constitutionally, there would have to be a fundamental redirection of American law. That transformation need not be at the level of core First Amendment principles so much as in the underlying conception of the purpose of elections.

III. HOLDING THE LINE ON SPENDING

British developments of the past decade confirm the fundamental incompatibility between a party financing regime premised on spending limits and one based on liberty concerns over individual rights of self-expression. Thus far, all of the British authorities to address the issue—an advisory committee, Parliament, and several judicial opinions—have sought to limit *Bowman* to the fact of strikingly low expenditure limits while circling the wagons over the broader question of overall spending limits.

The initial reaction in Britain was to read *Bowman* narrowly to its facts. The Committee on Standards in Public Life, a standing advisory committee chaired by Lord Patrick Neill, was asked to evaluate the “implications of the *Bowman* judgment.”⁵³ The Committee concluded that the simplest way to accommodate *Bowman* would be to “raise the limit on expenditure above £5.”⁵⁴ Raising the amount to something “of the order of £500 . . . would provide an allowance sufficient to cover . . . the production and distribution of a leaflet throughout a constituency or the publication of an advertisement in a local newspaper,” but would not be so large as to “force [a] candidate to devote part of his or her limited resources to rebutting the attacks made by the third parties.”⁵⁵

Textual differences between European law and the more categorical commands of the First Amendment allowed the Committee the interpretive latitude to defend its limited reading of *Bowman*.⁵⁶ The crucial difference, according to the Committee, was that Article 10(1) of the European Convention on Human Rights, guaranteeing “the right to freedom of expression,” is expressly subject in Article 10(2) to such restrictions “as are

53. COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIFTH REPORT, STANDARDS IN PUBLIC LIFE: THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, 1998, Cm. 4057-I, at 16.

54. *Id.* at 129.

55. *Id.*

56. *Id.* at 130 (“The language of Article 10 of the Convention is quite different from the free speech right laid down in the First Amendment to the United States Constitution [T]he First Amendment has been given an absolutist interpretation. In the context of attempted limitations on election expenditures such restrictions have been repeatedly set aside by the United States Supreme Court.”).

prescribed by law and are necessary in a democratic society.”⁵⁷ This proviso to the Convention’s guarantee of free expression left Britain some room, the Committee believed, to regulate campaign spending as long as the limit was not as low as in *Bowman* and as long as the limit could be justified as “necessary in a democratic society.” The Committee found this democratic necessity in Article 3 of the First Protocol to the Convention, which obliged each state to “hold free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁵⁸ This “free election principle” fit neatly with the British government’s argument that “it needs to protect voters (and thus to protect them in respect of their voting rights) from being subjected to overwhelming election propaganda by a party which has greatly superior financial resources.”⁵⁹

The Committee accordingly read *Bowman* narrowly only to strike down the particular way in which spending limits were set, a view that resonated with academic commentary that also saw *Bowman* as what in the U.S. would be termed an “as applied” challenge to the particular balances drawn in “imposing expenditure ceilings to promote electoral fairness.”⁶⁰ The entire system could be salvaged were the decimal point moved two places to the right, an effort that was quickly implemented as Parliament passed the 2000 Political Parties, Elections and Referendums Act (PPERA), replacing the 1983 Act’s £5 limit with a £500 limit for third party expenditures per-registered-voter limit for local government elections.⁶¹ It also “largely implement[ed] the Neill Committee’s recommendations” with regard to national spending limits on political parties and third parties.⁶²

The effectiveness of the PERPA remains a matter of debate for reasons both practical and jurisprudential. First, as with any altered rules, there is the question of how interested actors will respond—specifically, whether raising the third party spending limit to £500 would enable “like-minded persons to ‘pool’ resources against particular candidates and thereby skew

57. See *id.* at 127 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]).

58. *Id.* at 128 (citing European Convention, *supra* note 57, Protocol I, art. 3).

59. See *id.*

60. Navraj Singh Ghaleigh, Case and Comment, *Election Spending and Freedom of Expression*, 57 CAMBRIDGE L.J. 431, 432–33 (1998); see also Colin Feasby, *Issue Advocacy and Third Parties in the United Kingdom and Canada*, 48 MCGILL L.J. 11, 13 (2003).

61. Political Parties, Elections and Referendums Act, 2000, c. 41, § 131.

62. Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law*, 2 ELECTION L.J. 499, 507 (2003); see also *id.* at 507–14 (laying out the limit’s definition, means of calculation, and means of enforcement).

the balance of debate,” with the effect of “undermining expenditure ceilings.”⁶³ More pessimistically, Professor Keith Ewing worries that the PPERA failed to engage the real thrust of *Bowman*, such that it was “unlikely that these reforms will be the last word on third party limits [I]t is surely only a matter of time . . . before Convention rights prove to be the midwife for the further liberalization of laws designed to promote electoral equality.”⁶⁴

Thus far, the issue has been joined only at the level of British courts and not the ECHR, and the result has been a narrow construction of *Bowman*, along the lines suggested by the Neill Committee.⁶⁵ Of greatest significance is the 2008 decision by the House of Lords in *Regina (Animal Defenders International) v. Secretary of State for Culture, Media and Sport*,⁶⁶ a challenge to the total ban in Britain on political advertising on television and radio.⁶⁷ In a setting much like *Bowman*, a single-issue advocacy group sought to force attention to an issue not generally presented as part of British elections.⁶⁸ The question in *ADI* was whether an advertising campaign on “My Mate’s A Primate” could be banned from the airwaves.⁶⁹ There was simply no escaping that the British law governing broadcast expression was even more categorical than the expenditure limitation at issue in *Bowman*:

No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial dispute.⁷⁰

For the House of Lords, the question was whether the effect of *Bowman* and *VgT* would force a recasting of the British law on independent political expression. The short answer was decidedly no. Using the same analytic

63. Ghaleigh, *supra* note 60, at 433. Oddly, one immediate effect is that third parties are at risk because they are forbidden to exceed the spending limits for 365 days prior to election day. See PPERA, c. 41, sched. 10, § 3(3). Because election dates are not fixed, third parties have no effective way of knowing when their expenditures might run afoul of the regulations. Colin Feasby identified this curious feature of British law for me.

64. Ewing, *supra* note 62, at 506–07.

65. See *id.* at 506.

66. [2008] UKHL 15, [2008] 1 A.C. 1312 (appeal taken from Eng.) (U.K.).

67. Communications Act, 2003, c. 21, § 321(2) (prohibiting, *inter alia*, any advertisement “which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature . . . [or] is directed towards a political end”).

68. See *ADI*, [2008] 1 A.C. at 1336.

69. See *id.*

70. *Id.* at 1337.

framework as the Neill Committee, the House of Lords held that even the absolute ban was compatible under the framework set out in Article 10 and *Bowman* because the restriction was one that was “necessary in a democratic society,” as permitted by Article 10(2).⁷¹

In laying out its reasoning, the House of Lords emphasized the traditional arguments underlying the stringent British regulations of campaign spending. Lord Bingham conceded that the Convention regime protected “free speech in general and free political speech in particular” but argued that it was “highly desirable that the playing field of debate should be so far as practicable level,” which “is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction.”⁷² He distinguished the ECHR’s decision in *VgT*, where “the full strength of this argument [for political equality] was [not] deployed.”⁷³ He also distinguished *Bowman*, where the ban on advertising “was held to operate . . . as a total barrier to Mrs. Bowman’s communication of her views,” from *ADI*, where the interest group was prohibited only from advertising on television and radio, a ban no “wider than is necessary to promote the legitimate object which it exists to serve.”⁷⁴

Writing separately, Lord Scott reiterated the importance to British political life of “ensur[ing] a level playing field for the promotion or defence of political ideas.”⁷⁵ This point was made even more forcefully by Baroness Hale, who characterized the case as a fundamental test of “striking the right balance between the two most important components of democracy: freedom of expression and voter equality.”⁷⁶ Lord Scott acknowledged the apparent tension between *VgT* and the House of Lords ruling but fell back on the claim that, in any case, the ECHR’s decision in *VgT* was “not binding on domestic courts.”⁷⁷ Time will tell.

71. *Id.* at 1349.

72. *Id.* at 1346.

73. *Id.*

74. *Id.* at 1347.

75. *Id.* at 1350. Lord Scott made clear, however, his concern that the ban on political broadcasts might be incompatible with Article 10 in other particular cases. *Id.* at 1350–51.

76. *Id.* at 1353.

77. *Id.* at 1351–52.

IV. ALTERNATIVE CONCEPTIONS OF EQUALITY AND COMPETITION

It is of course possible that the introduction in BCRA of an “election period” is the opening salvo in an attempt to redefine radically the American law governing the electoral process. But there is also the tendency to pick and choose from different ways of organizing production without understanding how they fit into the product as a whole.

There is a story, now perhaps apocryphal, that when American auto companies began to slip in the 1970s, worried Detroit executives went to Japan to observe the new-found wonders of Japanese auto manufacturing. They noticed the high morale of Japanese auto workers and attributed it (as did Japanese managers) to the morning calisthenics and the singing of the company song before each shift. Thinking this was the key to Japanese production (rather than innovative product design, high quality and manufacturing efficiencies), the impressed executives returned to the U.S. and tried to enlist the alienated post-Vietnam generation of auto workers in rousing renditions of the Ford or GM anthems. The results were desultory, though perhaps no worse than many other decisions that plagued America’s aging auto industry.⁷⁸

The point is simply that plucked out of context, reform measures rarely will have the kind of systemic integrity that will allow them to function properly. That is precisely why the *Bowman* decision is so threatening to the British electoral system. The prohibition on private spending—even the overly draconian figure of £5, a figure that does not cover the cost of a trip to and from the further sections of London—is not an aberration but a part of an integrated system that restricts any efforts to run elections as anything but a choice between the major parties.

If a distinct election period is to take hold in the American context, it must work as part of a comprehensive set of restrictions, much as existed in Britain prior to *Bowman*. The shock in Britain was in part the reaction to the unfamiliarity of the ECHR applying the European Convention in a country in which there had not been a tradition of judicial review capable of striking down acts of Parliament. But we can see a similar result reached in a more proximate setting that shares with the U.S. a well-defined set of constitutional principles allowing plenary judicial review and a set of speech restrictions much like the First Amendment. I refer, of course, to Canada and its constitutional tradition following the adoption in 1982 of the Canadian Charter of Rights and Freedoms.⁷⁹

78. For a perceptive early analysis, see EMMA ROTHSCHILD, *PARADISE LOST: THE DECLINE OF THE AUTO-INDUSTRIAL AGE* (1973).

79. See Canada Act, 1982, c. 11, sched. B, pt. I (U.K.).

Because of parliamentary elections, there is a distinct election period in Canada. Until a reform in 2007, each parliament could last no longer than five years, and the government was obligated to call elections sometime during that period, a practice modeled on Westminster.⁸⁰ Numerous restrictions apply during the election period, most notably strict limits on expenditures—as opposed to the American practice of granting the most regulatory grace for contributions rather than expenditures. Indeed, the Canadian practice is almost the mirror image of the American post-*Buckley* world. Whereas the U.S. tries to regulate the supply of money through contributions, it leaves the world of demand unchecked through the erection of a constitutional block against efforts to restrain expenditures.⁸¹ Canada, by contrast, assumes an objective of equalizing the resources in political debates, and hence focuses on expenditure limitations. As explained by the Canadian Supreme Court in the landmark ruling on *Libman v. Quebec*:

If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard

For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups.⁸²

80. With the adoption of section 56.1(2) of the Canada Elections Act, Canada has moved closer to fixed term election. Canada Elections Act, 2000 S.C., ch. 9, § 56.1(2). There must now be an election on the third Monday in October every four years if the government does not fall or resign in the interim. *Id.* Some argue that flexible election dates give the governing party an unfair advantage in strategically scheduling elections, and there seems to be a general trend in “Westminster countries” toward increasingly fixed-period elections. See Henry Milner, *Fixing Canada's Unfixed Election Dates: A Political Reason to Reduce the Democratic Deficit*, IRPP POLICY MATTERS, No. 6 (2005), available at <http://www.irpp.org/faithtrak/index.htm>. For example, most Canadian provinces now have quasi-fixed dates.

81. Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 533 (2000).

82. [1997] 3 S.C.R. 569, 598–99 (Can.) (citations omitted).

In order to implement the equalization objectives, Parliament promulgated the Canada Elections Act of 2000, which set out rather restrictive spending limits, including on independent actors. Under the Act, no citizen could spend more than \$3,000 in any election district or \$150,000 nationally to promote or oppose a candidate for office.⁸³ Even more stringent was a provision that extended the spending limit to any publicity concerning any issue with which a candidate might be “particularly associated.”⁸⁴ This is a far more intrusive restriction on speech than anything found in U.S. election laws.⁸⁵

In upholding the constitutionality of the 2000 Act, the Canadian Supreme Court pushed even further:

The Court’s conception of electoral fairness as reflected in the foregoing principles [from *Libman*] is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation[.] Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another.⁸⁶

Now that is an election period. Most striking is the contrast to the non-election period, in which there are no limits on political advertising other than general disclosure requirements. The combination of an unregulated pre-election period, the tightly regulated election period, and the rise of fixed election dates has led to an increase in political advertising outside the election period, particularly by third parties who are unable to participate

83. Canada Elections Act § 350.

84. § 350(2)(d).

85. For an analysis on the jurisprudence of the Canadian Supreme Court concerning the equality rationale, see Colin Feasby, *The Supreme Court of Canada’s Political Theory and the Constitutionality of the Political Finance Regime*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE, *supra* note 27, at 245.

86. Attorney Gen. of Can. v. Harper, [2004] 1 S.C.R. 827, 868, 2004 SCC 33 (Can.) (citations omitted). It is noteworthy that the Canadian Supreme Court cites to Owen Fiss’s *The Irony of Free Speech* for the proposition that the State, far from being an enemy of free speech in the electoral arena, can equalize participation by enhancing the voices of some and restricting those of others. *Id.* (citing OWEN M. FISS, *THE IRONY OF FREE SPEECH* 4 (1996)). This is precisely the argument that the *Buckley* Court rejected as any justification for campaign finance regulation.

during the formal election period. The result may not fit well within American First Amendment jurisprudence, but it coheres around a certain logic of how an electoral system should operate—something notoriously missing in the cobbled together law of American campaign finance regulation.

Canada is interesting because with a relatively similar set of basic constitutional guarantees, the Canadian Supreme Court adopts an equality model of political campaigns, one quite distinct from the constitutional touchstone of liberty that is the basis of American constitutional law. The two approaches by no means exhaust the range of possibilities in the difficult domain of political party funding.

Previously, Richard Pildes and I have written favorably about the basic approaches taken by Germany's Federal Constitutional Court, (*Bundesverfassungsgericht*).⁸⁷ The German Court restricts those campaign funding restrictions that it deems are likely to thwart competition for elective office.⁸⁸ In its first cut at the vexing problem of how to finance political parties, the German Court in 1958 struck down a statutory provision that allowed political contributions to be tax deductible: "[T]he possibility of deducting donations to a political party from taxable income creates an incentive primarily for corporate taxpayers and those with high incomes to make donations The challenged provisions, therefore, favor those parties whose programs and activities appeal to wealthy circles"⁸⁹ The German Court suggested that, as an alternative, the government could provide public funding to parties and parliamentary candidates. The court allowed funding to be tied to electoral support, but not on successfully running for office. According to the German Court, that would tend to lock in place permanently the parties already represented in the Bundestag: "It is inconsistent with the principle of equal opportunity for [the Bundestag] to provide these funds only to parties already represented in parliament or to those which . . . win seats in parliament."⁹⁰ The German Court similarly struck down a requirement that a party needed to obtain at least 2.5% of the votes in order to qualify for public funding on the grounds that a 0.5% threshold guaranteed political seriousness and allowed more competitive challenges to the status quo.⁹¹

87. See Issacharoff & Pildes, *supra* note 26, at 690–99.

88. *Id.* at 695–97.

89. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 203 (2d. ed. 1997) (translating the Party Finance Case I, 6 BVerfGE 273 (1957)).

90. See *id.* at 208 (translating the Party Finance Case III, 20 BVerfGE 56 (1966)).

91. See *id.* at 210–11 (commenting on the Party Finance Case IV, 24 BVerfGE 300 (1968)).

Like the Canadian equality model, the German approach has the virtue of organizing constitutional oversight of the party funding process around a principled logic, even if some of the applications are difficult and no doubt contestable. Regardless of the normative appeal of either model, the coherence is what sets them apart from either BCRA's curious insertion of an election period into American law or the attempt to impose a liberty of expression constraint onto British law.

V. CONCLUSION

A decade before BCRA, Frank Sorauf wrote caustically of the world of campaign finance regulations that the Supreme Court had bequeathed:

We shall never know what kind of regulatory regime the FECA amendments of 1974 created because they were so drastically altered by the Supreme Court in *Buckley v. Valeo*. What was intended to be a closed system in which the major flows of money into and out of campaigns were fully controlled emerged as an open system of uncontrolled outlets when the Court struck down all limits on direct spending in the campaign by candidates, PACs, and individuals. A tightly constrained regulatory system became a more relaxed, open-ended one. The modifications in *Buckley* meant that the original 1974 plan would never have to meet its two severest tests: the administration of spending limits in hundreds of races and the accommodation of excess money in a system with no effective outlets. Instead, the crippled FECA affected chiefly the recruitment of money, ending the freedom of the fat cats and encouraging the development of PACs.⁹²

It is certainly intriguing that BCRA introduced, for the first time, a distinct arena of electioneering communications during a temporally-defined election period. If the logic were to play out, this might be the opening gambit in a more administrative approach to the funding of political campaigns with a corresponding protection from assaults from without. Without a deeper set of institutional arrangements of the sort seen in Britain or Canada, however, BCRA's innovation appears as simply one more act of grafting on oddly mismatched parts to the chaotic law of American campaign finance.

Perhaps the concern over an animating constitutional logic is misplaced. American law, like American life, values the ability to persevere and muddle through on a pragmatic basis. But with current campaign finance law

92. FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 238 (1992).

looking ever more precarious in the Supreme Court, the healthy impulse to “leave what’s working well enough alone” appears incapable of generating the ever finer pragmatic distinctions necessary to sustain the law of campaign finance in the post-*Buckley* period.

